88-1341

SUPREME COURT, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

KEVIN EUGENE FUNKHOUSER and
JAMIE ANN FUNKHOUSER, *Petitioners*,

v.

THE STATE OF OKLAHOMA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIAN M. DELL
1200 North Walker
Suite 200
Oklahoma City, Oklahoma
73103
(405) 235-1971
Counsel of Record

February 15, 1989

10 pp

QUESTIONS PRESENTED

Has the Oklahoma Court of Criminal Appeals deprived the petitioners of their rights to due process, equal protection under the law, and a jury trial, guaranteed under the Sixth and Fourteenth Amendments, when the Oklahoma Legislature has clearly expressed its intention to excuse reliance on prayer as an alternative treatment to providing medical attendance to sick children as not being a "crime?" Has the court of criminal appeals subjected the petitioners to trial, conviction and incarceration by permitting the prosecution to use the executive and judicial branches of state government to chill the legislatively authorized reliance on prayer, resulting in the trial, conviction, and incarceration of the petitioners?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Kevin Eugene Funkhouser and Jamie Ann Funkhouser, and the respondent State of Oklahoma.

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Petitioners Kevin Eugene Funkhouser and Jamie Ann Funkhouser respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Oklahoma Court of Criminal Appeals entered on May 23, 1988, and for which a timely filed petition for rehearing was denied on November 22, 1988.

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at 763 P.2d 695, and is reprinted in

the appendix hereto p. 1a, *infra.* The order denying the petition for rehearing is reprinted at p. 18a, *infra*. Orders correcting the denial order are reprinted at pp. 20a and 22a, *infra*, respectively.

The judgment and sentence of the McClain County District Court was not reported. Each is reprinted in the appendix hereto, p. 24a and 28a, *infra.*

JURISDICTION

The petitioners herein were charged with and convicted of manslaughter in the second degree (Title 21, Okl.Stat. 1981 §716) and sentenced to two years in the Oklahoma State Penitentiary on June 6, 1984. Appeal was taken to the Oklahoma Court of Criminal Appeals. The judgment and sentences were affirmed on May 23, 1988. A timely filed petition for rehearing was denied on November 22, 1988. The petitioners began serving their sentences on December 28, 1988.

On January 11, 1989, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including February 20, 1989.

The jurisdiction of this Court to review the judgment of the Oklahoma Court of Criminal Appeals is invoked under 28 U.S.C. §1257 (3).

STATUTE INVOLVED

28 U.S.C. §1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any

commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Benjamin Keith Funkhouser died on the 15th day of July, 1983, at his parents' home in Purcell, Oklahoma. The child had been ill for approximately two weeks, during which period his parents, Jamie and Kevin Funkhouser, members of the Church of the First Born, provided constant home care for their son and called in the church elders to pray for their child. Although the child appeared improved at different times during the two-week period, he succumbed to suppurative bronchopneumonia and died.

At the time the Funkhouser baby died, Oklahoma law provided as follows:

> Every parent of any child who willfully omits, without lawful excuse, to perform any duty imposed upon the parent by law to furnish necessary food, clothing, shelter or medical attendance for such child is guilty of a misdemeanor. . . *Nothing in this section shall be construed to mean a*

child is endangered for the sole reason the parent or guardian, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment of such child.

. .

21 O.S.1981 §852. (Emphasis added.)

On the 29th day of July, 1983, the State of Oklahoma filed felony informations against Kevin and Jamie Funkhouser in the McClain County District Court, at Purcell, Oklahoma. Both defendants were charged with Manslaughter in the Second Degree in connection with the death of their three-month-old son.

At the preliminary hearing on September 9, 1983, the defendants moved the court to quash the informations on the ground that the statutory citation contained in the informations, both the original and amended informations referred to 21 O.S. §711, first degree manslaughter, although the body of the informations described a charge of second degree manslaughter. The court allowed the informations to be

amended *instanter* and the motions to quash the informations were overruled.

The Oklahoma Court of Criminal Appeals, a three-justice court in its entirety at the time of this opinion, is the final resort for criminal matters in Oklahoma. That court affirmed the rulings of the trial court and the jury verdict, one judge affirming, one judge concurring in the results of the opinion, and one judge dissenting.

The appeal was premised in part on the petitioners' contentions that they could only be charged with manslaughter in the first degree, not whether they could be subjected to a trial in connection with the baby's death. The substance of the petitioners' argument was that the law provided the right to follow religious beliefs, in good faith, for which they have now been punished. They asked for a new trial.

The appeals court dismissed petitioners' contentions, at p. 6a (763 P.2d at 697), stating that

(because of the petitioners' reliance on prayer) the petitioners could not have been convicted of a misdemeanor under 21 O.S.1981 §852, the statute providing prayer as an alternative to medical treatment. Further, the court said, adopting petitioners' position would have forced the State to charge appellants with a crime (manslaughter in the first degree) for which they could not have been convicted. The dissent, at page 15a, *infra*, chided the majority for usurping the province of the jury by assuming that a conviction could not be obtained on a charge of manslaughter in the first degree. The deprivation of a legal defense, the inappropriate state interference with rights of equal protection, denial of due process, and denial of a jury trial (on the reliance on prayer as a defense), are the basis for this request for review.

The testimony of State's witness, Sgt. Philip Willbanks, of the Purcell Police Department, showed that the care provided by the Funkhousers and the elders of

the Church of the First Born was consistent and compatible with what he believed to be the doctrines of that religion. Further, Sgt. Willbanks stated that he believed the Funkhousers were honest in their belief that they had done everything possible consistent with their beliefs for Benjamin Keith Funkhouser.

The defendants demurred to the evidence of the State on the grounds that the charge was improper for the acts alleged, that the defendants were wrongfully deprived of the defense allowed them under the law, that the evidence presented failed to show that a crime had been committed, or that they were the persons who probably had done it. The court overruled the demurrer.

The court ruled that the charge of Second Degree Manslaughter was the proper charge, that the issue of culpable negligence was for the jury to decide, and that the defense of religious belief in prayer as an alternative did not apply. Immediately thereafter the defendants sought a writ of mandamus from the Oklahoma Court of

Criminal Appeals, which was denied without an opinion.

Defendants then filed a motion to Quash the Information and to Dismiss Charges, which was overruled by the court. The defendants filed a Motion in Limine regarding the testimony expected of Alberta Vaught, mother of Jamie Anne Funkhouser, which the court overruled on April 30, 1984. The trial began immediately thereafter.

During the course of the testimony on behalf of the State, Alberta Vaught was asked if she had ever taken her daughter, Jamie (the defendant), to a doctor or hospital. Defendants objected on grounds of relevancy. Defendants further objected to the State being argumentative with its own witness, as well as irrelevant, by asking the witness why she had taken her daughter (Jamie) to the hospital and why Jamie had not taken her sick child to the doctor.

The petitioners argued that it was fundamentally unfair and grossly prejudicial for the State to present

evidence of whether the petitioner's mother had ever taken *her* to the hospital when she was a child. At the same time the court was denying the petitioners the defense of choosing prayer as an alternative, as provided in the statute requiring medical attendance, and further refused an instruction setting out the defense which would have been in compliance with statute providing for reliance on prayer.

The trial judge the overruled the defendants' demurrer at the close of the State's evidence.

During the presentation of the defendants' case, the court would not permit testimony to prove that the Church of the First Born was an established religion within the State. During the testimony of Loyal Thompson, defendants were prevented from establishing the tenets of that religion.

Again, during the testimony of Jim Robinson, an elder of the church, defendants attempted to establish a defense on their religious beliefs, but were prevented

from doing so by the trial court. The defense rested and reargued its demurrer to the State's evidence and moved for a directed verdict. The court overruled the demurrer and the motion.

During its first closing, the State suggested several procedures were "reasonable and prudent," which could have benefited Benjamin Funkhouser, including the use of antibiotics. The State argued that the religious beliefs of the parents would not have prevented them from doing the suggested medical procedures. When the defendants later attempted to argue that the State's definition of "a reasonably careful person" had been carefully drawn to exclude a believer in the tenets of the Church of the First Born, the trial court interrupted the defendants' closing and sustained the State's objection.

Thereafter, during the State's second closing, the State continued to hammer at the religious defense.

The petitioners objected to the failure to submit their requested instructions, particularly the instructions

that would have required the jury to find the petitioners not guilty if the jury believed the parents relied on prayer as an alternative to medical attendance. The petitioners also objected to the court giving an instruction on manslaughter in the second degree not in conformity with the statute. The petitioners' objections were all overruled.

After deliberating, the jury returned a verdict in an inappropriate form (finding the petitioners guilty, but sentencing them to indeterminate sentences, which are not permitted by Oklahoma law and which caused the petitioners to object to the clarity of the instructions). The defendants moved for a mistrial based on the verdict returned, and the court overruled the motion. The jury later returned a verdict the court accepted, and the defendants moved for a directed verdict and a verdict not on the verdict of the jury, all of which the court denied.

Judgment and sentence of two years' imprisonment in the Oklahoma State Penitentiary was pronounced and

imposed on June 6, 1984; defendants' Motion for New Trial, which had been filed on May 31, 1984, was overruled at the same time. Defendants filed their Notice of Intent to Appeal on June 6, 1984, also. Bail in the amount of $3,000.00 cash, each, was set and posted; the defendants remained free until December 28, 1988, when they surrendered to the sheriff to begin serving their sentences.

The question is not whether the petitioners have a Constitutional right to select religious healing of a child, but whether that right, granted by the Oklahoma Legislature, may be derogated by the State or the court by artifice or by turning a blind eye to Oklahoma statutes, to the detriment of the substantive rights of the petitioners.

The concern of the petitioners was the denial of the statutorily available defense of reliance on prayer for healing, not whether they wished to be charged with first degree manslaughter rather than second degree. They

were denied a substantive right.

The three-judge court, the final authority in Oklahoma on criminal matters, has unanimously held that if an act fits the crime of manslaughter in the first degree, the accused may not be tried for manslaughter in the second degree. The court has not questioned that holding in their opinion. Rather, in this case, the court said the petitioners could not have been *convicted* of manslaughter in the first degree, but stated, at p. 6a (763 P.2d at 697), that where an act or omission is made punishable in different ways by different provision of the criminal code, a violator may be punished under either.

Thus the Court of Criminal Appeals has held that where a crime fits the definition of manslaughter in the first degree, it cannot be manslaughter in the second degree. Likewise, the court now pronounces that where the defendants might not be convicted because of a defense to manslaughter in the first degree, they may be charged with and convicted of manslaughter in the second

degree.

The Oklahoma Court of Criminal Appeals has thus deprived the petitioners of a statutorily granted defense and has allowed their conviction contrary to statutory law. The court did so without reconsidering its earlier holding in *State v. Lockhart*, 664 P.2d 1059 (Okl.Crim.App. 1983), that the defense was indeed available. Rather, the court of criminal appeals allowed the prosecution and the trial court to circumvent the *Lockhart* decision and the clear will of the Oklahoma Legislature. This is a violation of due process of law in that the petitioners were convicted for an omission that the legislature had specifically chosen *not* to make criminal.

Oklahoma statutorily mandated the duty of parents to provide medical care to sick children, making the breach a misdemeanor. The statute establishes an excuse to be considered by a jury regarding the providing of medical care while following good faith religious beliefs for healing.

In Oklahoma, there are no common law crimes, only those prescribed or authorized by the statutes. 21 O.S.1981 §2. The Oklahoma Court of Criminal Appeals now holds that the petitioners may be found culpably negligent by withholding medical attendance, a duty required by statute in Oklahoma. In the same stroke, from the same statute, the court carved out and cast away the religious reliance on prayer as a defense.

The dissent, at p. 14a (763 P.2d at 699), did not miss this crucial point when the very same statute imposes the duty to provide medical attendance, the only basis for the accusation of culpable negligence. The dissent states it is absurd to allow district attorneys to circumvent expressed legislative intent.

The parents were entitled to rely on the laws of Oklahoma and the rulings of the court of criminal appeals, and to select prayer in lieu of medical attendance to heal their child. The method selected was an allowable alternative under the law, no less allowable

than if the parents had selected medical attendance, with the same result.

The issues presented are not whether the Constitution allows parents to rely on faith healing, although the prosecutorial and judicial approach has indirectly attacked the petitioners' religious freedom. The issues are whether the parents' rights of liberty, due process, and equal protection guaranteed under the Sixth and Fourteenth Amendments have been breached by the appeals court's conflicting judgments which circumvent established state law on which the parents reasonably relied to provide, in good faith, alternative treatment relying on prayer for healing. The petitioners seek a new trial and release from their present incarceration.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Oklahoma Court of Criminal Appeals deprives the petitioners of their rights to (a) due process, (b) equal protection under the law, and (c) a jury trial on the reliance on prayer as an alternative to medical attendance.

Contrary to the expressed intent of the Oklahoma Legislature, the Oklahoma Court of Criminal Appeals eliminated the good faith reliance of parents to choose prayer for healing of sick children, as an alternative treatment to medical attendance. The Oklahoma legislature had enacted a criminal statute[1] setting forth

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[1]The Oklahoma statute, 21 O.S.1981 §852, provides in its entirety, as follows:

> Every parent of any child who willfully omits, without lawful excuse, to perform any duty imposed upon the parent by law to furnish necessary food, clothing, shelter or medical attendance for such child is guilty of a misdemeanor; provided that any person who leaves the state with intent to avoid providing necessary food, clothing, shelter or medical attendance for such child is guilty of a felony and upon conviction thereof shall be punished in the State Penitentiary for a period not exceeding one (1) year. Nothing in this section shall be construed to mean a child is endangered for the sole reason the parent or guardian, in good faith, selects and depends upon spiritual means alone

the duties of parents which was in effect on July 15, 1983, the day the Funkhouser baby died from pneumonia.

The intent of the legislature is unmistakably clear: "Nothing in this section shall be construed to mean a child is endangered for the sole reason the parent or guardian, in good faith, *selects and depends upon spiritual means alone through prayer*, in accordance with the tenets and practice of a recognized church or religious denomination, *for the treatment of such child*. . ." The Oklahoma Court of Criminal Appeals itself had previously recognized the clear legislative intent in its ruling in *State v. Lockhart*, 664 P.2d 1059, 1060 (Okl.Crim.App. 1983), stating:

> through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment of such child; provided, that the laws, rules, and regulations relating to communicable diseases and sanitary matters are not violated. However, nothing contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his health or welfare.

> We believe that the statute is clear and unambiguous, and expresses a legislative intent that those parents who rely in good faith upon the [tenets] of their religious belief for the care and protection of their children be allowed a defense to a misdemeanor charge subsequently arising from their failure to obtain medical assistance for their children.

The Funkhouser baby died on July 15, 1983, just two months after *Lockhart* was decided on May 31, 1983. The court had noted in *Lockhart* that a change had been made in the law, to take effect on November 1, 1983, which the court said fortified its impression of the legislative intent to provide for the reliance on prayer in lieu of medical attendance. *Id*, p. 1060.

On May 1, 1984 the Funkhousers were convicted of manslaughter in the second degree[2], for "culpable

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[2]Specifically, Oklahoma's second degree manslaughter statute provides as follows:

> Every killing of one human being by the act, procurement or culpable negligence of another, which, under the provisions of this chapter, *is not Murder, nor Manslaughter in the First Degree, nor excusable* nor justifiable homicide, is Manslaughter in the Second Degree. 21 O.S.1981 §716. (Emphasis added.)

negligence" in the death of Benjamin Keith Funkhouser and later sentenced to two years in the State Penitentiary, which they are now serving.

Ironically, at the preliminary hearing, the State based the claimed duty avoided by the Funkhousers as the duty to furnish medical assistance under 21 O.S.1981 §852, recited above. In other words, the Court of Criminal Appeals, while agreeing with the State's claim that it was the parents' duty to furnish medical assistance under §852, rejected the petitioners' right to rely on prayer as a legislature-approved alternative to medical attendance embodied in that same statute, and which in a criminal case would be presented as an excuse.

Prior to the trial of this matter in the McClain County District court, the petitioners moved the court to quash the informations charging them with manslaughter in the second degree. In *Miller v. State*, 523 P.2d 1118, 1121 (Okl.Crim.App. 1974), that court ruled that where the misdemeanor-manslaughter doctrine was applicable,

it absolutely precludes a charge of second degree manslaughter. *Miller* was not challenged nor reversed by the court.

The Funkhousers argued that 21 O.S.1981 §852 imposed duties on them and that it a question for the jury whether they had met the duties required. If they had failed, it would be a misdemeanor and the misdemeanor-manslaughter rule[3] would apply. If they had not failed in their duty, they would be guilty of no crime. But the appeals court apparently determined independently of any jury that the Funkhousers did not fail in that duty, since charging them with manslaughter in the first degree "would have forced the State into the

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[3]Oklahoma's first degree manslaughter statute, its so-called "misdemeanor-manslaughter" rule, provides in pertinent part:

> Homicide is Manslaughter in the First Degree in the following cases:
>
> 1. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor.
>
> . . .

21 O.S.1981 §711

untenable position of charging the appellants with a crime for which they could not have been convicted in the State of Oklahoma." See p. 5a, *infra*.

The dissent in this matter, at p. 16a, *infra*, concluded that the majority had failed to reconcile this decision with *Lockhart's* clear explication of the statute involved, and that the idea that district attorneys had sole authority to determine which charge to file was absurd. The dissent also noted that the court had impermissibly invaded the province of the jury by substituting its speculative judgment that the petitioners could not be convicted under the facts presented. The dissent capsulized the petitioners' argument of breach of Sixth and Fourteenth Amendment guarantees.

The conduct of the preliminary hearing set the tone for later constitutional deprivations, and the way in which the appeals court dealt with the pretrial publicity was astonishing. In its opinion, at p. 4a, *infra*, the appeals court dismissed the complaint that the

proceedings were televised, contrary to Oklahoma law.[4]

The record clearly demonstrated that the preliminary hearing was videotaped, but the appeals court somehow concluded the hearing was neither photographed nor broadcast. Not only did the record reflect the photographing, it was replete with objections to the continued photographing and a threat by the court to remove petitioners' counsel for repeatedly objecting.

In its opinion, the court noted that such photographing was prohibited. See p. 3a, *infra*. Less than one month after this opinion, the court reversed a murder conviction because photographers were in the courtroom at the sentencing. *See, Mark Edward Brennan v. Oklahoma*, No. C-85-690, 60 O.B.J 23, 1988 WL

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[4]Oklahoma law, 5 O.S.1981, Ch. 1, App. 4, Canon 3(A)(7)(e), provides:

> No photographing, or broadcasting by radio or television of any portion of any criminal proceeding, and continuing until the issues have been submitted to the jury for determination, *unless all accused persons who are on trial shall have affirmatively, on the record, given their consent to the photographing or broadcasting.* (Emphasis added.)

139888 (December 21, 1988).

The Funkhousers had requested an instruction identical to the instruction in *Lockhart*, since the court had previously acknowledged the legislative intent to allow prayer as a substitute for medical attendance. The trial court refused, giving instead the "State's" instruction below. The trial court gave the following instruction shown on the left, refusing the instruction on the right:

State	*Lockhart*
A person may be justified under the law of this State in not providing medical treatment of his child if instead the parent in good faith, selects and depends upon spiritual means alone through prayer, in accordance with tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease of such child, provided said treatment or cure is something which a reasonably careful person would do under similar circumstances and conditions.	A person is justified under the law of this state in not providing medical treatment for his child if instead that parent in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment of cure of disease of such child.

The Court of Criminal Appeals, at p. 9a, *infra*, said the State's requested and given instruction accurately reflected the defense of good faith reliance on spiritual means. However, the instruction emasculated the defense and, when combined with the trial court's refusal to allow the petitioners even to put on a defense to demonstrate their reliance on prayer, the petitioners were effectively denied due process and equal protection.

The given instruction contained superficially acceptable language, alluding to a defense of reliance on prayer. But combined with the refusal to allow the petitioners' witnesses, in their case in chief, to testify regarding their religion or its beliefs, the instruction merely gave the appearance of permitting a religious defense: changing the tenor of the instruction to one permissive in nature by use of the word "may," savaged the clear defense that if the jury found the parents relied on prayer as an alternate treatment, they would not be guilty of neglect; by adding, not extraneous language but,

language conditioning the reliance on prayer to "something a reasonably careful person would do under similar circumstances and conditions," was a direct attack on the petitioners' religious beliefs and on the clear import of the statute and legislative intent.

The effect of the instruction was to deny the defense to Manslaughter in the First Degree provided by the legislature and to allow the prosecutor to obtain a second degree manslaughter conviction in any case in which the religious defense could be asserted. The statutory first degree manslaughter defense, as explained and approved in *Lockhart*, is a "good faith" defense. The court's instruction allowed no such defense when second degree manslaughter is charged. Rather, parents must adhere to a "reasonably careful" person standard and have a defense only when a "reasonable careful" person would rely on prayer. The statute granting the defense is clear.

This attack by the executive and judicial arms of the State cannot be characterized as merely an incorrect

decision, which might escape scrutiny of examination of the standards of equal protection under the law and due process required under the Fourteenth Amendment. Nor can it be characterized as setting up a permissible classification for regulation, in the furtherance of legitimate state aims.

The petitioners' assertion is not that the court of criminal appeals misinterpreted the Oklahoma statute. Rather, without changing its view as to the meaning of the statute, the court allowed the prosecutor to circumvent a legislatively-drafted defense. The petitioners have been convicted of a "crime" which the legislature, as recognized by the court of criminal appeals, chose not to make criminal.

This mocks the petitioners' religious beliefs by pretending to allow a religious defense set out in Oklahoma law, by using permissive words and creating a standard (the reasonably careful person), not in the law. Such latitude impermissibly allows the jury to disregard

the statutory defense of good faith reliance on prayer.

The Funkhousers were not charged for physically abusing their baby, nor for callous conduct, nor for inadvertent action, which resulted in the death of their child. What little evidence the trial court permitted regarding religious beliefs demonstrated that the baby had constant care from the moment his parents noticed he was ill. The State's witnesses testified that the child was attended constantly, made comfortable, anointed with oil, and prayed for by all members of the Church of the First Born with knowledge that the baby was ill. The Funkhousers were charged with culpable negligence, the failure "to do something a reasonable and prudent person would do. . ." See p. 9a, *infra*.

The decision of the Oklahoma Court of Criminal Appeals has a chilling effect on the practice of religion. The state legislature regulates behavior in the area of providing medical attendance for children and had specifically chosen not to regulate religion by allowing

prayer as a good faith alternative to such medical attendance. The parents had relied on the legislature's choice.

The prosecutor and the court of criminal appeals have now reversed that legislative decision. If this is allowed, others whose religious practices have likewise not been regulated, will be chilled in those religious practices.

There can be little doubt that district attorneys have used the coercion of a criminal charge as an attempt to stifle certain religious beliefs. *See Sherbert v. Verner*, 374 U.S. 398 (1963), at 402, *citing, Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Wisconsin v. Yoder*, 405 U.S. 205, at 218 (1972). And here the prosecutor did not argue that the law failed to balance the interests of the state against the right to follow religious beliefs and should be held unconstitutional. *Wisconsin v. Yoder, supra,* at 217-218.

The district attorney, in the trial court and with the support of the court of criminal appeals, used this

prosecution to assert the primacy of his own belief that medical care was the only method of care. The assertion is clearly contrary to the expressed intention of the Oklahoma Legislature.

A state, acting through its legislative, executive, or judicial authorities may not act to deny equal protection of the laws to the individuals of that state. *Cooper v. Aaron*, 358 U.S. 1 (1958). The actions of the district attorney the court of criminal appeals are impregnated with governmental character and are subject to constitutional limitations placed upon state action. *Gilmore v. Montgomery*, 417 U.S. 556 (1974).

CONCLUSION

For these various reasons, this petition for certiorari should be granted. As noted above, the rights were statutorily granted, so this is not an issue of deprivation of First Amendment guarantees of freedom of religion. The petitioners believe it is clear from the

opinion of the Oklahoma Court of Appeals that both the state and the court impermissibly violated the petitioners' guarantees under the Sixth and Fourteenth Amendments, together with an intended chilling effect on rightful religious beliefs and by depriving them of rights assured by the Oklahoma Legislature. Petitioners ask the matter to be remanded to the District Court of McClain County for appropriate disposition.

Respectfully submitted,

BRIAN M. DELL
Speck & Dell, Attorneys
1200 N. Walker, Ste. 200
Oklahoma City, Oklahoma
73103
(405) 235-1971

Counsel of Record

February 15, 1989

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEVIN EUGENE FUNK-HOUSER and JAMIE ANN FUNKHOUSER,	)	FILED May 26, 1988 James W. Patterson, Clerk
Appellants,	)	
-vs-	)	No. F-84-748
STATE OF OKLAHOMA,	)	
Appellee.	)	

OPINION

BUSSEY, Judge:

Kevin Eugene Funkhouser and Jamie Ann Funkhouser were jointly charged, tried and convicted by a jury in McClain County District Court Case No. CRF-83-716 of Manslaughter in the Second Degree. Both appellants received two (2) year sentences. From these sentences the appellants appeal.

On July 15, 1983, Benjamin Keith Funkhouser, the appellants' three month old son died at home from complications arising from pneumonia. The appellants,

although knowing Benjamin was ill, did not seek medical help Instead, the parents relied on prayer and divine intervention to heal their child. The parents are members of The Church of The New Born that relies on divine intervention for healing sickness to the exclusion of medical assistance.

The church bases its belief on James 5:14-15 of the Holy Bible.[1] Pursuant to scripture, the elders of the church prayed for Benjamin and anointed him with oil one week prior to this death, and they visited again three days before he died.

During the two weeks that Benjamin was sick his condition continually worsened. The infant was unable to breast feed and the appellants fed him with an ear syringe. The appellants did not seek medical aid and the child died.

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[1]James 5:14-15 (KJV) reads as follows: "Is any sick among you? Let him call for the elders of the church; and let them pray over him, anointing him with oil in the name of the Lord: And the prayer of faith shall save the sick, and the Lord shall raise him up; and if he have committed sins, they shall be forgiven him."

I

Appellants contend that they were irreparably harmed since the trial court allowed the preliminary hearing to be televised. We disagree. A reading of the record reveals that the preliminary hearing was neither photographed nor broadcast.

A juvenile proceeding was being held prior to the appellants' preliminary hearing. Apparently the judge granted a television photographer access to the courtroom. The photographer filmed the juvenile proceeding and people in the courtroom, including the appellants.

Before the commencement of the preliminary hearing, the judge, upon defense counsel's objection, prohibited the media from filming the appellants, their counsel or defense witnesses pursuant to 5 O.S.1981 Ch.1 App.4, 3A(7).

A preliminary hearing is within the definition of a criminal proceeding referred to in 5 O.S.1981 Ch.1 App.4,

3(A) (7) (e). This provision prohibits the photographing or broadcasting of any criminal proceeding without the accused's consent. The period before the preliminary hearing was not part of the proceeding. The appellants have failed to show they were harmed by any filming which took place in the courtroom prior to their preliminary hearing. Consequently, this assignment of error is without merit.

II

The appellants contend that the trial court erred in overruling their motion to quash the information and dismiss the charges. The appellants argue that they should have been with charged with Manslaughter in the First Degree (misdemeanor manslaughter) under 21 O.S. 1981, § 711(1).

The State charged the appellants with Manslaughter in the Second Degree under 21 O.S.1981, § 716. That statute reads:

> Every killing of one human being by the act, procurement or culpable negligence of another which, under the provisions of this

> chapter is not murder, nor manslaughter in the first degree, nor excusable, nor justifiable homicide, is manslaughter in the second degree.

The State alleged culpable negligence of the appellants by failing and refusing to seek medical attention for their child.

The appellants urge that they should have been charged with Misdemeanor Manslaughter. They assert that the misdemeanor, Omission to Provide for a Child, 21 O.S.1981, § 852 [2] was the predicate misdemeanor giving rise to Misdemeanor Manslaughter.

Reliance on 21 O.S.1981, § 852 provides an absolute defense to First Degree Manslaughter. State v. Lockhart, 664 P.2d 1059 (Okl.Cr.1983). To adopt the appellants' position would have forced the State into the untenable position of charging the appellants with a crime for which they could not be convicted in the State of Oklahoma.

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[2] 21 O.S.1981, § 852 has been substantially amended by Laws 1983 c.44, § 1, codified at 21 O.S.Supp. 1986, § 852, Nov.1, 1983.

The filing of a criminal information is a decision that is within the prosecutor's discretion. The prosecutor has the sole authority to decide under which statute to file charges. Wolfenbarger v. State, 710 P.2d 114 (Okl.Cr.1985), cert. denied _____ U.S. _____, 106 S.Ct. 2915, 91 L.Ed.2d 544. Title 21 O.S.1981, § 11 provides that where an act or omission is made punishable in different ways by different provisions of the criminal code, a violator may be punished under either. Satepeahtaw v. State, 595 P.2d 805 (Okl.Cr.1979).

Under the law in existence at the time the appellants were charged, the District Attorney could not have prosecuted for Manslaughter in the First Degree. The situation existed where the death of the appellants' child could not have been filed as Manslaughter in the First Degree since the predicate misdemeanor would not have sustained the charge. The homicide was not murder, neither was the homicide excusable or justifiable. Therefore, the prosecutor properly charged the appellants

with being culpably negligent of their son's death under Manslaughter in the Second Degree.

Based upon the foregoing, we find that the trial court did not err in overruling the appellants' motion to quash the information.

III

Appellants allege that the trial court erred in denying their motion in limine. The appellants did not support this assignment of error with citation of authority. We have repeatedly held that assignments of error must be supported by argument and authority. Perez v. State, 614 P.2d 1112 (Okl.Cr.1980). Since the appellants were not deprived of their fundamental rights we will not search the books for authority to support their argument.

IV

A further contention is that the trial court erred by refusing to instruct the jury on the appellants' version of the defense of good faith reliance on spiritual means.

The appellants relying on Lockhart v. State, supra, submitted Requested Instruction No. 11:

> A person is justified under the law of this State in not providing medical treatment of his child if instead the parent in good faith, selects and depends upon spiritual means alone through prayer, in accordance with tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease of such child.

We found this instruction appropriate in Lockhart where the appellants were charged with Manslaughter in the First Degree. In the present case, the appellants were charged with Manslaughter in the Second Degree and the appellants' requested instruction would have been improper.

The State submitted and the court adopted the instruction that:

> A person may be justified under the law of this State in not providing medical treatment of his child if instead that parent in good faith, selects and depends upon spiritual means alone through prayer, in accordance with tenets and practices of a recognized church or religious denomination, for the treatment or cure of disease of such child, provided that said

> treatment or cure is something which a reasonably careful person would do under similar circumstances and conditions. (Emphasis added)

This instruction accurately reflected the defense of good faith reliance on spiritual means. The instruction considered by the jury did not provide the appellants with the absolute defense proposed by their requested instruction. The trial court properly circumscribed the defense under a reasonably careful person standard that is within the definition of culpable negligence. We have defined culpable negligence as:

> the omission to do something which a reasonable and prudent person would do, or the want of the usual and ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances an conditions. Crosset v. State, 96 Okl.Cr. 209, 217, 252 P.2d 150, 159 (1952).

Good faith reliance on spiritual means alone is not a defense to Manslaughter in the Second Degree. Since the evidence warranted the defense of good faith reliance on spiritual means, the court properly allowed the

appellants the defense within the boundaries of the definition of culpable negligence.

Appellants also assert the trial court erred in refusing their Requested Instruction No. 12. The requested instruction places the burden on the State to prove that the appellants were not acting in good faith in depending upon spiritual means alone, and failure to do so would result in a finding of not guilty. Appellants' requested instruction was properly refused by the trial court since rebutting good faith reliance on spiritual means alone was not the State's burden of proof.

Appellants claim that their objection to Instruction No. 6 should have been sustained. Instruction No. 6 is a verbatim Oklahoma Uniform Jury Instruction, OUJI-CR 462. These instructions are definitive and to be followed when applicable. 12 O.S.1981, § 577.2.

It is within the discretion of the trial court to determine the instructions presented to the jury. Asher v. State, 546 P.2d 1343 (Okl.Cr.1976). We find that the

contested instructions fairly and accurately state the applicable law and consequently find appellants' assignment of error without merit.

V

The appellants contend that the jury was confused by the trial court's instructions and the jury's confusion indicated that the trial court erred in its instructions. The jury during deliberation inquired by note as to when punishment was to be set. The trial judge replied by note telling the jurors to read the instructions. When the jury returned to the courtroom with their verdict, it sentenced the appellants to "not less than two (2) nor more than four (4) years in the penitentiary." The trial judge instructed the jury to read the instructions. The jury returned to deliberate and subsequently returned a verdict fixing punishment at two (2) years in the penitentiary.

We find this assignment of error without merit. The jury seems to have exhibited some confusion over

the sentencing provisions of the instructions, possibly over a perceived ambiguity in that instruction. However, the appellants have failed to demonstrate how the instructions in particular or as a whole were confusing and prejudicial. The jury returned with the minimum punishment, a two year sentence. This was in accordance with the jury's original intent to punish the appellants with time to serve in the penitentiary. We do not find that the appellants were prejudiced by the instructions. Taken as a whole the instructions accurately reflect the applicable law. Furthermore, there is no substantial ambiguity in the instruction covering punishment. See, DeVaughn v. State, 717 P.2d 1153 (Okl.Cr.1986).

Accordingly, for the foregoing reasons, the judgment and sentence of the trial court is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF McCLAIN COUNTY, OKLAHOMA THE HONORABLE KENNETH J. LOVE, DISTRICT JUDGE

KEVIN EUGENE FUNKHOUSER and JAMIE ANN FUNKHOUSER, appellants, were jointly charged, tried and convicted by a jury in McClain County District Court Case No. CRF-83-716 for Manslaughter in the Second

Degree. Both appellants received two (2) year sentences. From these sentences the appellants appeal. AFFIRMED.

BRIAN M. DELL
SPECK AND DELL
OKLAHOMA CITY, OKLAHOMA
Attorney for the Appellant

ROBERT H. HENRY
ATTORNEY GENERAL
DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
STATE OF OKLAHOMA
OKLAHOMA CITY, OKLAHOMA
Attorneys for Appellee

OPINION BY: BUSSEY, J
BRETT, P.J., CONCURS IN RESULTS
PARKS, J., DISSENTS

PARKS, Judge, Dissenting:

I dissent to the majority's affirmance of appellants' convictions, insofar as I agree with appellants that the trial court erred in overruling their motion to quash the information on the ground that the proper charge was first degree manslaughter pursuant to 21 O.S.1981, § 711(1), the misdemeanor-manslaughter rule.

The undisputed testimony in the instant case shows that the appellants knew their child was ill, but chose not to seek secular medical treatment relying instead on spiritual means through prayer. Where the misdemeanor-manslaughter doctrine is applicable, it absolutely precludes a charge of second degree manslaughter as a matter of law. **See** 21 O.S.1981, § 716; **Miller v. State**, 523 P.2d 1118, 1121 (Okla. Crim. App. 1974). At preliminary hearing and trial, the State presented evidence establishing a prima facie violation of 21 O.S. 1981, § 852, which provided in relevant part: "Every parent of any child who willfully omits, without lawful authority, to perform any duty imposed upon the parent by law to furnish necessary food, clothing, shelter or **medical attendance** for such child is guilty of a misdemeanor ...." (emphasis added). **See Lamb v. State**, 293 P.2d 624 (Okla. Crim. App. 1956). A charge of first degree manslaughter was applicable here because the death of appellants' child occurred "without a design to

effect death by a person while engaged in the commission of a misdemeanor." 21 O.S.1981, § 711(1). Accordingly, the charge of second degree manslaughter was improper and the trial court erred in overruling the motion to quash.

The majority ignores the foregoing applicable law, stating that reliance on the good faith spiritual means defense of 21 O.S.1981, § 852, would have provided appellants with an absolute defense to first degree manslaughter. It "would have forced the State into the untenable position of charging the appellants with a crime for which they could not be convicted in the State of Oklahoma." **Majority Opinion**, at 3. Such a position impermissibly invades the province of the jury by substituting the majority's judgment, which is speculation at best, that the jury would have found this defense under the facts presented. But the question of whether appellants relied upon spiritual means " in good faith" within the meaning of 21 O.S.1981, § 852, was a question

for the jury upon proper instructions. It was for the jury, not the prosecutor or this Court, to determine whether the defense was available based on the evidence presented.

The majority also fails to reconcile its decision today with its prior reasoning in **State v. Lockhart**, 664 P.2d 1059 (Okla. Crim. App. 1983). Judge Bussey, writing for a unanimous court in **Lockhart**, 669 P.2d at 1060 stated:

> We believe that the statute is clear and unambiguous, and expresses a legislative intent that those parents who rely in good faith upon the tenets of their religious belief for the care and protection of their children be allowed a defense to [charges] subsequently arising from their failure to obtain medical assistance for their children.

Thus, under **Lockhart**, this Court recognized a legislative intent not to punish parents who relied in good faith upon spiritual means for the physical well being of their children. It is absurd to allow district attorneys to circumvent the expressed legislative intent by charging an inapplicable offense under the guise that district attorneys

have sole authority to determine what charge to file as such reasoning flies in the face of Section 716 and **Miller, supra**.

Although it is true that the Legislature amended Section 852, effective November 1, 1983, to eliminate this defense " where permanent physical damage could result to such child," this substantive change cannot be applied retroactively to the offense here which occurred on July 15, 1983, without violating the **ex post facto** prohibition. Okla. Const. art. II, § 15. Based on the foregoing, I would reverse and remand for a new trial consistent with the views expressed herein.

(End of document.)

Order denying petition for rehearing and directing issuance of mandate, filed November 22, 1988.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEVIN EUGENE FUNK-HOUSER and JAMIE ANN FUNKHOUSER, Petitioner, -vs- THE STATE OF OKLAHOMA Respondent.	FILED Nov 22, 1988 James W. Patterson, Clerk No. F-84-748

ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE

NOW on this 22nd day of Nov. 1988, having examined the petitioner's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF

THIS COURT this 22nd day of November, 1988.

/s/ Tom Brett
TOM BRETT, PRESIDING JUDGE

/s/ Hez J. Bussey
HEZ J. BUSSEY, JUDGE

ATTEST:

/s/James Patterson
Clerk
(End of document.)

Order correcting opinion, filed December 6, 1988.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEVIN EUGENE FUNK-HOUSER and JAMIE ANN FUNKHOUSER,	)	FILED Dec 6 1988 James W. Patterson, Clerk
Appellants,	)	
-vs-	)	No. F-84-748
THE STATE OF OKLAHOMA	)	
Appellee.	)	

CORRECTION ORDER

IT IS HEREBY THE ORDER OF THIS COURT that the opinion in the above styled and numbered cause should be, and hereby is, corrected to reflect the following:

On Page 1, paragraph 1, line 3, the Case No. "CRF-83-716" should be changed to "CRF-83-126".

On Page 6, summary paragraph at the conclusion of the opinion, line 3, the Case No. "CRF-83-716" should be changed to "CRF-83-126".

WITNESS MY HAND AND THE SEAL OF THIS COURT this 6th day of December, 1988.

/s/Hez J. Bussey

ATTEST:

/s/James Patterson
(Clerk)
(End of document.)

Order correcting opinion, filed January 3, 1989.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEVIN EUGENE FUNK-HOUSER and JAMIE ANN FUNKHOUSER,	)	FILED Jan 3 1989 James W. Patterson, Clerk
Appellants,	)	
-vs-	)	No. F-84-748
THE STATE OF OKLAHOMA	)	
Appellee.	)	

CORRECTION ORDER

IT IS HEREBY THE ORDER OF THIS COURT that the opinion in the above styled and numbered cause should be, and hereby is, corrected to reflect the following:

On Page 1, paragraph 1, line 3, the "Case No. CRF-83-126" should be changed to "Case Nos. CRF-83-126 and CRF-83-127."

On page 6, summary paragraph at the conclusion of the opinion, line 3, the "Case No. CRF-83-126" should

be changed to "Case Nos. CRF-83-126 and CRF-83-127."

WITNESS MY HAND AND THE SEAL OF THIS COURT this 3rd day of January, 1989.

/s/ Hez J. Bussey
HEZ J. BUSSEY, JUDGE

ATTEST:
/s/ James Patterson
(Clerk)
(End of document.)

Judgment and sentence on conviction of Kevin Eugene Funkhouser, filed June 8, 1984.

IN THE DISTRICT COURT OF McCLAIN COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	FILED COURT CLERK JUN 8 1984
Plaintiff,	)	
vs.	)	No. CRF-83-126
KEVIN EUGENE FUNKHOUSER,	)	
Defendant.	)	

JUDGMENT AND SENTENCE ON CONVICTION

Now, on this 6th day of June, 1984, the same being a juridical day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant KEVIN EUGENE FUNKHOUSER being personally present in open court, and being duly represented at all appearances before the court by counsel of record, and having been legally charged with the offense of MANSLAUGHTER, SECOND DEGREE, and having

been fully informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pledged not guilty to said offense after having been duly advised of all legal and constitutional rights; and having been duly and legally tried and convicted of the crime of MANSLAUGHTER, SECOND DEGREE and the defendant upon being asked by the court whether there was any legal cause to show why judgment and sentence should not be pronounced stating none, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of MANSLAUGHTER, SECOND DEGREE.

It is THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that KEVIN EUGENE FUNKHOUSER is sentenced to a term of two (2) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Lexington Regional Treatment Center, Lexington,

Oklahoma, Pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department for the crime of MANSLAUGHTER, SECOND DEGREE said term of sentence to begin at and from the delivery of the defendant to the Superintendent of the Lexington Regional Treatment Center at Lexington, Oklahoma, and that said defendant shall pay the cost of his prosecution, taxed at $_____ for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of the right of appeal.

It is Further Ordered, Adjudged and Decreed by the court that the Sheriff of McClain County, Oklahoma transport said defendant to the said Lexington Regional Treatment Center at Lexington, Oklahoma, and that the Superintendent of the said Lexington Regional Treatment Center detain the said defendant according to this judgment, sentence and order that the clerk of this court do immediately certify, under the seal of the court, and deliver to the Sheriff of McClain County, Oklahoma, two

copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said Lexington Regional Treatment Center at Lexington, Oklahoma, to be left therewith at the said Lexington Regional Treatment Center, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of McClain County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.

/s/ J. Kenneth Love
JKL Judge

(Seal)
Attest:

Joyce Mosbey
Court Clerk

By /s/Pam Dantzler, Deputy Court Clerk
(End of document.)

Judgment and sentence on conviction of Jamie Ann Funkhouser, filed June 8, 1984.

IN THE DISTRICT COURT OF McCLAIN COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	FILED COURT CLERK JUN 8 1984
Plaintiff,	)	
vs.	)	No. CRF-83-127
JAMIE ANN FUNK-HOUSER,	)	
Defendant.	)	

JUDGMENT AND SENTENCE ON CONVICTION

Now, on this 6th day of June, 1984, the same being a juridical day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant JAMIE ANN FUNKHOUSER being personally present in open court, and being duly represented at all appearances before the court by counsel of record, and having been legally charged with the offense of MANSLAUGHTER, SECOND DEGREE, and having

been fully informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pledged not guilty to said offense after having been duly advised of all legal and constitutional rights; and having been duly and legally tried and convicted of the crime of MANSLAUGHTER, SECOND DEGREE and the defendant upon being asked by the court whether there was any legal cause to show why judgment and sentence should not be pronounced stating none, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of MANSLAUGHTER, SECOND DEGREE.

It is THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that JAMIE ANN FUNKHOUSER is sentenced to a term of two (2) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Lexington Regional Treatment Center, Lexington,

Oklahoma, Pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department for the crime of MANSLAUGHTER, SECOND DEGREE said term of sentence to begin at and from the delivery of the defendant to the Superintendent of the Lexington Regional Treatment Center at Lexington, Oklahoma, and that said defendant shall pay the cost of his prosecution, taxed at $_____ for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of the right of appeal.

It is Further Ordered, Adjudged and Decreed by the court that the Sheriff of McClain County, Oklahoma transport said defendant to the said Lexington Regional Treatment Center at Lexington, Oklahoma, and that the Superintendent of the said Lexington Regional Treatment Center detain the said defendant according to this judgment, sentence and order that the clerk of this court do immediately certify, under the seal of the court, and deliver to the Sheriff of McClain County, Oklahoma, two

copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said Lexington Regional Treatment Center at Lexington, Oklahoma, to be left therewith at the said Lexington Regional Treatment Center, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of McClain County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.

/s/ J. Kenneth Love
JKL Judge

(Seal)
Attest:

Joyce Mosbey
Court Clerk

By /s/Pam Dantzler, Deputy Court Clerk
(End of document.)